**BEFORE THE HONORABLE HIGH COURT OF KARNATAKA**

**WP No. 100000 of 2015**

*Hassleton Investment Limited, Singapore*

*V/s*

1. *The Authority for Advance Ruling (Income Tax), New Delhi*
2. *Director of Income-tax (International Taxation), Bengaluru*

1. Hassleton Investment Limited (HIL or the company) is a company registered and tax resident of Singapore. HIL is involved in the activity of investing in the securities of various emerging markets. India is, by and large, its major investee destination where the company has invested heavily on the securities listed on Indian stock exchanges. HIL was incorporated on April 1, 2009 in Singapore. HIL registered itself with Securities and Exchange Board of India (SEBI) as a Foreign Institutional Investor (FII) as per SEBI (Foreign Institutional Investors) Regulations, 1995 (FII Regulations).

2. Upon the introduction of the SEBI (Foreign Portfolio Investors) Regulations, 2014 (FPI Regulations) which came into force from June 01, 2014, HIL converted itself into an FPI with the SEBI as per the FPI Regulations. Though HIL had expertise on the securities markets of all the countries in which it had invested, its typical way of functioning is to appoint an Investment Advisor in every country in which it made investments. Therefore, for India, HIL had engaged the services of Securities Advisors India Ltd (SAIL), a company registered in Bengaluru under the Companies Act, 1956, which acts as key advisor to HIL. The relationship between HIL and SAIL was such that, for SAIL, HIL is by and large the biggest client without which SAIL will almost run out of business. At times, some of the decisions taken by HIL to invest in Indian listed securities were at the office of SAIL, Bengaluru if the Investment Manager or other key personnel of HIL happened to be in India at the time of the decision. However, SAIL also has few other clients and provides similar services to them as it provides to HIL. On the other hand, though HIL has its own expert team (i.e. Investment Managers) to advise on investments in India, without the support of SAIL, HIL would not be as big as it is today insofar as India is concerned. SAIL was paid huge commission fees every year on the investment advisory provided to HIL.

3. HIL has been investing in Indian listed securities heavily over the years and has brought in several billion dollars to the Indian capital market under the FII route. Though, typically, FIIs' investments into India have been very volatile i.e. they enter and exit the secondary markets within a short span, HIL's investments in India have been habitually for couple of years. HIL was not merely interested in the capital appreciation of its investments but believed in holding the investments for a longer period so that the invested funds (especially in case of IPOs) can be put to use by the investee companies for some meaningful use. With regard to the capital gains HIL made while offloading the securities i.e. while selling them to a third party, etc., in case of short term capital gains, it was covered under the beneficial provision of section 115AD of the Income Tax Act, 1961 (the Act) which was specifically introduced in the Act for FIIs like HIL. On the long term capital gains it made, which is the usual gains it makes, it availed the exemption under section 10(38) of the Act and also paid the Securities Transaction Tax (STT) while claiming such exemption.

4. In the month of January 2015, HIL planned to dispose of its major investments made in Indian listed securities. One of the main reasons was that these investments have been held by HIL for couple of years and it thought it was the right time to sell them since the stock markets were rallying bullish due to new Union Government and there was euphoria among various sectors in which these investments were made by HIL. In the first week of January 2015, HIL sold its major Indian investments and made gargantuan capital gains which ran into several thousand crores. HIL strongly believed that since all the securities were sold on the floor of the stock exchanges, it will only have to pay STT and since the entire capital gains were long term capital gains (LTCG), the LTCG were exempt from capital gains tax under section 10(38) of the Act and no further tax was required to be paid by it. However, in order to be certain of this tax position, especially because of various controversial rulings of Authority for Advance Ruling (AAR), HIL filed an application before AAR on January 27, 2015 to ensure that the transaction of sale of shares on the floor of the stock exchanges undertaken by it was exempt from capital gains tax and especially that no further tax was required to be paid by it whatsoever.

5. On filing the application before the AAR, the Director of Income-tax (International Taxation), Bengaluru was served notice by AAR with a copy of the application for its appearance and reply on the tax position taken by HIL. HIL filed its return of income (ROI) every year to be on safer side with the Income Tax Department (ITD) at Bengaluru as SAIL was located in Bengaluru. SAIL helped HIL in these aspects too.

6. The ITD at Bengaluru appeared before the AAR and strongly put forth its argument that HILS's case was squarely covered by the rulings of AAR in *The Timken Company case (2010) 326 ITR 193 (AAR)* and *Praxair Pacific Limited case (2010) 326 ITR 276 (AAR)* in which the same AAR explicitly held that if foreign companies have any place of business in India then such companies will be liable to pay Minimum Alternate Tax (MAT) under section 115JB of the Act. The ITD argued that, SAIL, which is the sole and the key investment advisor of HIL is its permanent establishment (PE) i.e. Agency PE in India and therefore, it clearly falls within the decisions of the Timken and Praxair cases, more specifically because these two rulings have attained finality as neither the ITD nor the concerned taxpayers questioned the ruling before a superior forum. Therefore, the ITD argued that HIL was required to pay MAT as per section 115JB of the Act on the total income of HIL.

7. HIL forcefully argued before AAR that SAIL was an independent agent and was never working under the control or supervision of HIL and therefore, can never be treated as its Agency PE. HIL argued that the business premises of SAIL can never be treated as that of HIL's and therefore, it has never established a fixed place of business as required under Timken and Praxair cases as held by this AAR. HIL also argued that since it neither had place of business nor PE in India, it was never required to prepare its financials as per erstwhile Companies Act, 1956 as well as new Companies Act, 2013 which is applicable to the present case. It further argued that being an FII and later converted into FPI, it is purely covered by special regime of SEBI (FII) Regulations, 1995 and SEBI (FPI) Regulations, 2015 and therefore, Companies Act of 1956 and 2013 will not be applicable to it.

8. After hearing these initial arguments, the AAR posted the matter for final hearing in the month of June 2015. When the matter came up for final hearing on June 30, 2015, HIL pointed out to AAR that as per the Finance Act, 2015 (FA 2015) which was passed in the Union Budget in February 2015, the Government has amended the Act in such a way that foreign companies (which infers that whether or not they had a place of business or permanent establishment in India) were not liable to pay MAT by inserting clauses (fb) and (iid) to Explanation 1 to subsection (2) to section 115JB. HIL argued that the Act defines 'foreign company' means a company which is not a domestic company and that the Act being a complete code in itself, the need to borrow the meaning from other enactments especially, the Companies Act 2013 does not arise. Therefore, the FA 2015 which has carved out the capital gains made on sale of listed securities by foreign companies from the

ambit of MAT, HIL was not required to pay any MAT. Interestingly, HIL argued that since an amendment was made only to Explanation 1 of 115JB(2) of the Act, it was not just prospective but was also retrospective in nature and therefore, HIL was also covered by this amendment. HIL cited the example of amendment to section 9(1)(i) of the Act by inserting Explanations 4 and 5 to section 9(1)(i) of the Act which was retrospectively inserted from 1961 just to cover Vodafone like transactions.

9. On the other hand, the ITD vehemently argued that the amendment to section 115JB by the FA 2015 was only prospective in nature since a new exemption from taxation was granted to specified category of taxpayers and therefore, taxpayers like HIL were very much covered prior to the amendment i.e. prior to April 1, 2015 within the ambit of levy of MAT. Further, the ITD argued that the term 'company' in section 115JB(1) of the Act very much covers foreign companies which are required to prepare its financials as per Companies Act, 2013 since HIL had a place of business in India through SAIL. ITD argued that the Companies Act, 2013 defined 'foreign company' in a wider manner to mean that *any company incorporated outside India which has a place of business in India whether by themselves or through an agent, physically or through electronic mode; and such company conducts any business activity in India in any manner*. The ITD argued that since section 115JB makes a reference to the Companies Act (be it 1956 or 2013), the definition of 'foreign company' has to be relied under the Companies Act, 2013. It argued that this is a settled position and there is no need to take a contrary view on this. HIL on the other hand argued that it never had place of business in India directly and SAIL was never its agent under any circumstances. Even assuming that SAIL was its agent, HIL argued that it never conducted its business from India as all investment decisions were made in Singapore being its country of incorporation.

10. On hearing all these arguments, the AAR posted the matter for orders on September 07, 2015.

11. When the matter came up for final hearing, the ITD submitted before the AAR that the matter has become infructuous since report submitted by Justice AP Shah Committee has elaborately covered these issues and the Press Release issued by Ministry of Finance dated September 01, 2015 and CBDT's Instruction No. 9/ 2015 dated September 02, 2015 have categorically made it clear that once a foreign company has a place of business/ PE in India, it will be liable to pay MAT under section 115JB of the Act. On the other hand, HIL

argued that above mentioned report, press release and instruction have only strengthened its case since a foreign company can now be subject to MAT only if it has place of business/ PE in India. The ITD had argued that the press release and the instruction mentioned not mere place of business but also permanent establishment as defined in the applicable tax treaty and therefore, would be sufficient to attract MAT provisions on HIL. It pointed out that in the case of the applicant/ HIL, India – Singapore tax treaty was applicable and that HIL – SAIL relationship was very much a Principal – Agent relationship and therefore, SAIL was HIL's Agency PE in India. HIL finally argued that importing the definition of PE from a tax treaty was not required as the Act itself had defined PE albeit under section 92F which pertains only to *Fixed PE* and not *Agency PE*. HIL closed its arguments stating that even the definition of 'Business Connection' which is akin to Agency PE of any tax treaty was relevant only for the purpose of section 9(1)(i) and not for the purpose of MAT. Since the section which governs MAT i.e. 115JB has not defined PE much less Agency PE, HIL submitted that by virtue of section 90(2) of the Act either the Act or a tax treaty whichever is more beneficial in this regard will be applicable to it and requested the AAR to disregard the definition of PE under the India – Singapore tax treaty. However, HIL argued that since the entire capital gains was liable to tax only in Singapore under Article 13(4) of India – Singapore tax treaty, imposition of MAT by ITD was violation of its treaty obligations.

12. After hearing the final arguments, the AAR rejected the arguments of HIL and shortly concluded that HIL clearly had an Agency PE in India and therefore, was liable to pay MAT under section 115JB by virtue of the clear position of the Government of India and CBDT as per the press release and instruction issued in the month of September 2015 even though the transaction in question pertains to FY 2014-15. It also held that the definition of 'foreign company' should be borrowed from Companies Act, 2013 and that HIL had a place of business in India through SAIL. The AAR also extensively relied on Justice AP Shah Committee's report to arrive at its conclusion.

13. Being aggrieved by the order the AAR, pursuant to Supreme Court's judgment in *Columbia Sportswear vs. Director of Income Tax, Bangalore (2012) 34 ITR 161 (SC)*, HIL in the month of December 2015 filed a writ petition of Certiorarified Mandamus before the Hon'ble Karnataka High Court under Article 226 of the Indian Constitution to quash the order of the AAR and to prevent the ITD from any recovery proceedings.

14. The High Court of Karnataka has admitted the writ petition filed by HIL, served notice to the ITD, Bengaluru being the respondent and has posted the matter for final hearing. The Court wanted to be specifically addressed by the parties on the issues mentioned below to dispose of the writ petition in the light of Justice AP Shah Committee's report, press release, instruction and any other reliable source of information until the date of disposal of the writ petition.

    i. Whether MAT provisions will be applicable to the petitioner being a 'foreign company' as per the definition under Income Tax Act, 1961 and the Companies Act, 2013.

    ii. Whether the petitioner had any type of Permanent Establishment / Place of Business / Business Connection either under Income Tax Act, Companies Act or relevant tax treaty.

    iii. Whether the petitioner is required to prepare financials as per Companies Act, 2013 or whether it is governed by SEBI Regulations.

    iv. Whether the Finance Act, 2015 amendment on imposition of MAT on foreign company is prospective or retrospective as argued by both parties.

    v. Whether capital gains exemption as per India – Singapore tax treaty will be applicable to the petitioner and whether imposition of MAT will be violative of the tax treaty.

    vi. Whether the petitioner can cherry pick the provisions of Income Tax Act and tax treaty for the purpose of definition of PE under the Act and capital gains exemption under the tax treaty.

    vii. Whether 115JB is equally applicable to FIIs / FPIs and Foreign Direct Investors (FDI) and the scope and nature of functioning of FIIs / FPIs and FDIs to understand the investments into India.

    viii. Such other issues as deem fit by the parties.